

1 IN THE CIRCUIT COURT OF THE STATE OF OREGON
2 FOR THE COUNTY OF MULTNOMAH
3 The Estate of JESSE D.)
WILLIAMS, Deceased, by and)
4 through MAYOLA WILLIAMS,)
Personal Representative,) Volume 3-B
5)
Plaintiff,)
6)
vs.) No. 9705-03957
7)
PHILIP MORRIS INCORPORATED,) Afternoon Session
8) 3:00 - 5:00 p.m.
Defendant.)

9
10 TRANSCRIPT OF PROCEEDINGS
11 BE IT REMEMBERED that the above-entitled
12 Court and cause came on regularly for hearing
13 before the Honorable Anna J. Brown on Wednesday,
14 the 24th day of February, 1999, at the Multnomah
15 County Courthouse, Portland, Oregon.

16 APPEARANCES
17
18 Raymond Thomas, James Coon,
William Gaylord and Charles Tauman,
Attorneys at Law,
19 Appearing on behalf of the Plaintiff;
20 James Dumas, Billy Randles, Walt Cofer
and Pat Sirridge,
21 Attorneys at Law,
Appearing on behalf of the Defendant.

22
23 KATIE BRADFORD, CSR 90-0148
Official Court Reporter
24 226 Multnomah County Courthouse
Portland, Oregon 97204
25 (503) 248-3549

2
1 (Wednesday, February 24, 1999, 3:00 p.m.)
2 P R O C E E D I N G S
3 (Court Reporter Jennifer
4 Wiles reported Morning
5 Session and Afternoon
6 Session until 3:00 p.m.)
7 (Whereupon, the following
8 proceedings were held in
9 open court:)
10 THE COURT: All right. Is everyone ready
11 to get started? I appreciate the courtesy of
12 the spectators. You know how distracting it is
13 when people get up and move in the middle of
14 your remarks. You have been wonderful. I thank
15 you for that, and we're ready to bring the jury
16 in, I believe. Let's do that.
17 (Whereupon, the following
18 proceedings were held in
19 open court, the jury being
20 present:)
21 THE COURT: All right. I'm taking it on
22 faith that you're all behind that screen,
23 jurors.
24 So Mr. Thomas, you may continue with
25 plaintiff's opening.

Plaintiff's Opening Statement

1 OPENING STATEMENT (Continuing)

2

3 BY MR. THOMAS:

4 Thank you, Judge. The air is moving.

5 This is my portion of the opening
6 statement, and I am going to try to be done by
7 3:45, so I am going to move fast.

8 We talked about this case being about
9 choices and about responsibilities. Let me say
10 at the outset, Jesse Williams has made choices
11 and his family accepts responsibility for those
12 choices, and asks you to consider and compare
13 the choices that Jesse Williams made with the
14 choices that Philip Morris made.

15 And you know that the development of
16 knowledge about tobacco was being played out in
17 a big way. And the role that tobacco plays and
18 has played in our lives before cigarettes came
19 into existence goes way back.

20 I am going to show you a smaller time
21 line, it's blank, and this is the time line of
22 Jesse Williams' life. I want to introduce to
23 you the testimony that we anticipate producing
24 in relation to him, so you can know a little bit
25 about who he is.

Plaintiff's Opening Statement

1 Well, first of all, Jesse Williams was
2 born in 1929 in Crockett, Texas. He had six
3 brothers and sisters and he was born on a farm;
4 and he grew up in Crockett, went to high school
5 there, graduated. As soon as he got out, he
6 joined the service.

7 This is a picture and it's -- I've got a
8 collection of pictures that I'm going to show
9 you. I am sorry that they're not higher
10 quality, but most of the pictures are ones that
11 are portraits. There are a not a whole lot of
12 pictures, but the few that there are, we'll show
13 you his history.

14 This is Jesse Williams right here. You
15 can see that he and his brother are both in
16 uniform. This is before he went to the Korean
17 War. So Jesse Williams left Crockett, Texas.
18 He was in the service. He went to Fort Knox,
19 and then he went to Fort Lewis.

20 And this is a little better quality
21 picture of him. When he left home, there he is
22 on a bicycle. Now, we know that cigarettes
23 began being part of our popular culture in about
24 the 1920s, 1930s. Jesse Williams, being born in
25 1929, was raised when things were different in

Plaintiff's Opening Statement

1 regard to the way that cigarette companies
2 talked about cigarettes, and the way that
3 cigarettes were viewed.

4 And we'll see evidence about the fact
5 that Philip Morris and other cigarette
6 manufacturers actually claimed that cigarettes
7 had health benefits. In those days, famous

8 baseball players, movie stars, famous people who
9 were glamorous, talked about how cigarettes were
10 a wonderful thing.

11 And in the magazines and the popular
12 press, cigarettes were not associated with any
13 kinds of health concerns. This was the
14 background from which Jesse Williams came.
15 These were the things that influenced him before
16 he made a decision to even try smoking or not
17 smoking a cigarette.

18 This is another picture of Jesse
19 Williams. This is the way he looked when he met
20 Mayola Williams, and they met each other when he
21 was in Portland on leave from Fort Lewis, and he
22 was visiting a friend of hers.

23 And the thing that she remembers about
24 him was that she just loved his smile and his
25 teeth. He had beautiful white teeth. And it

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Plaintiff's Opening Statement

1 was for her love at first sight, and their
2 romance led to being married in 1952. They were
3 married at the time that he died for 45 years,
4 and they had six kids.

5 Now, I just want to tell you a little bit
6 about who Jesse Williams and Mayola Williams
7 were in terms of their work. Jesse Williams had
8 his career as a janitor. He worked in a number
9 of schools in the Portland School District,
10 including Portsmouth, Martin Luther King. He
11 retired from the Portland School District in
12 1982 -- I'm sorry, 1992.

13 And Mayola Williams had a number of jobs,
14 but probably the one she has longest was down
15 here at the Portland Fish Company where she was
16 a clerk in the office for ten years, and then
17 she also worked for Portland Public Schools in a
18 clerical position for two years before she
19 retired in 1982.

20 And to just give you an idea about this
21 family, here they are. I guess you know who
22 Jesse is, and you know who Mayola is, and there
23 are their six kids. This was taken in the early
24 '60s.

25 Now, when Jesse Williams was in the

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Plaintiff's Opening Statement

1 service, he went to Korea. He was not yet a
2 cigarette smoker, but when he got there, he was
3 a sentry, and his sergeant told him that, "If
4 these Korean mosquitoes are giving you a hard
5 time, if you smoke cigarettes, it will keep them
6 away."

7 And that's what he did. Now, he started
8 smoking over there before Marlboro, the
9 cigarette, was developed. That was in '54-'55.
10 This was earlier in the '50s, during Korea. We
11 know that when he came back and met Mayola
12 Williams by then he was a cigarette smoker.

13 And then when Marlboro came out, Jesse
14 Williams become a Marlboro smoker. Jesse
15 Williams was a loyal smoker. He was a good
16 customer. He paid the price for the cigarettes.

17 He smoked cigarettes that were Marlboros
18 his whole life until he died in 1997, so he made
19 paid the price for the cigarettes and he also
20 paid the price for smoking them. He paid with
21 his life. So as a customer, he did what Philip
22 Morris wanted him to do. The evidence will show
23 that he fulfilled his end of the bargain.

24 And there is a history that Jesse
25 Williams had over the course of the years of his

8

Plaintiff's Opening Statement

1 life in regard to smoking, he wasn't what we've
2 heard some people describe, sort of a casual
3 smoker. Jesse Williams smoked a lot.

4 When he began smoking in the early 1950s,
5 he was about a pack-a-day smoker, but he swiftly
6 rose in the number of cigarettes that he smoked
7 a day to being a two-pack-a-day smoker, and when
8 he got into the '70s and '60s, he began smoking
9 two packs and into the '70s and into the '80s,
10 three packs of cigarettes a day. So he was what
11 would be considered a heavy smoker.

12 And there were some things about Jesse
13 Williams and smoking that you're going to learn
14 about in this case. I can't talk like Jesse,
15 but I've heard -- and I got to meet him before
16 he died. I've heard from his wife, Mayola, that
17 what he would say when he wanted to smoke a
18 cigarette was, "I got to take a smoke."

19 And then we know in 1964 when the Surgeon
20 General's Report came out, when one of his
21 family members would say something about, "Well,
22 now, those cigarettes are harmful to you. You
23 know about that." What Jesse would say was,
24 "You know, that's what the Government says, but
25 the tobacco company knows what they put in them,

9

Plaintiff's Opening Statement

1 and they wouldn't sell them if they was as bad
2 as anyone says."

3 And there are some examples that you are
4 going to learn about in terms of the
5 relationship that Jesse Williams had with
6 cigarettes. First, I'd like to show you where
7 he lived, because, you know, there is talk in
8 this case about all of the controversy,
9 allegations, denials, but if we were to go up to
10 the top of one of the downtown tall buildings
11 here, and go up on the roof, all of us, and take
12 a look around the town, we could pretty much see
13 Jesse Williams' life and where his life was
14 during the time that he was alive after he came
15 back from Korea.

16 He lived primarily in Southeast and
17 Northeast Portland. The last place he lived,
18 and maybe I'll blow this up a little bit, was
19 over at 35th and Ainsworth. I went over and
20 took this picture just the other day. This is
21 the house that Jesse died in right here.

22 It's at 35th and Ainsworth, maybe you can
23 see down there, you know how Ainsworth is a
24 boulevard. I just caught a little bit of it
25 down there. This is the house where Jesse died.

Plaintiff's Opening Statement

1 He loved to garden. Since he died, the house
2 has gone downhill a little bit in the yard, but
3 he loved to garden and be outside.

4 Towards the end of his life, he didn't
5 smoke inside anymore, he smoked outside, so he
6 would go out here in the garage. And when it
7 was raining, he would open up the garage door
8 and sit inside the garage and smoke. In order
9 to smoke that much, a person has to smoke every
10 20 or 30 minutes. So he spent a lot of time
11 smoking cigarettes and the view that he had
12 towards them was mixed.

13 But we do know that when we get an ice
14 storm, Jesse Williams' view of his role in the
15 family was as the provider. When we would get
16 an ice storm and the town would shut down,
17 they'd be out of milk in the house, the
18 conversation, "Well should we go out or not."
19 Well, if it wasn't an emergency, Jesse would
20 say, "Well, let's see what we can do today.
21 Let's see if we can get by with orange juice."

22 But at the end of the day, even if the
23 ice storm turned worse, and he ran out of
24 cigarettes, it became more important to get
25 cigarettes than milk, and he'd go out and he'd

11

Plaintiff's Opening Statement

1 get those things, so that he wouldn't run out of
2 cigarettes.

3 In fact, evidence in the case is going to
4 be that he and Mayola Williams had a little
5 game. She was not a smoker, never has been.
6 She doesn't like smoke, didn't like him smoking.
7 They would buy cigarettes by the carton. The
8 cigarettes that he would smoke are Marlboro
9 100s. So you may know what those are, they are
10 long cigarettes.

11 She'd take one out of the carton, put it
12 up in the cupboard, and then when Jesse Williams
13 would run out of cigarettes, he would go, "Oh,
14 honey, I am out of smokes. I am out, got to
15 take a smoke."

16 She'd say, "Oh, Jesse, up there behind
17 the cereal, you got one more pack, you better
18 make it last," and then he would make it last
19 until he went over to the school and was able to
20 buy more the next day.

21 Now, he was a guy who tried to quit
22 smoking. In about the middle of the 1970s, he
23 began to try to quit. He had good intentions,
24 but he couldn't do it. And what he'd say when
25 he'd light a cigarette after he tried to quit, I

12

Plaintiff's Opening Statement

1 think the longest he ever went was maybe three
2 days, he'd say, "Honey," that's what he called
3 Mayola Williams, "Honey, I just can't, I just
4 can't."

5 Now, it's not the plaintiff's position in
6 this case that Jesse Williams was completely
7 physically unable to quit smoking cigarettes,

8 and whether he was habituated or whether he was
9 addicted is something that you are going to have
10 to decide yourself in this case based upon the
11 things that you learn.

12 But I believe that the evidence will be
13 in this case if you were to take people on a
14 spectrum, occasional smokers. People where they
15 wake up in the morning, "I could have a
16 cigarette or I could have take a shower. I
17 could have a cigarette or eat breakfast, or I
18 could have a cigarette or I could walk the dog,"
19 and they chose to do those things rather than
20 instead of having a cigarette in the morning
21 when the blood level of nicotine is down, and if
22 they were on one end of the spectrum as a
23 smoker, then Jesse Williams was on the other
24 end.

25 Because the evidence is going to be that
13

Plaintiff's Opening Statement

1 when Jesse Williams woke up in the morning,
2 there was one thing that was going to happen
3 first, and that's a cigarette. In fact, Jesse
4 Williams had chronic bronchitis through his
5 adult life.

6 And the evidence will be some time in the
7 middle of the night, he would wake himself up
8 coughing. And he'd be like, Mayola wakes up,
9 she would be lying there. He would say, "Honey,
10 I got to take a smoke." In the middle of the
11 night, he'd smoke a cigarette before he could go
12 back to sleep.

13 Now one of the favorite things that Jesse
14 Williams had in his life was to watch basketball
15 games on TV. One of the favorite things that he
16 had was to have his kids over, and when the game
17 was on, All Star game, championship game, didn't
18 matter, in the course of that game, every 20
19 minutes or so, whether it is a big play or
20 Michael Jordan is in, whether the Blazers are
21 up, "Hey, I got to go take a smoke outside."

22 Know TV in the garage, "Got to go take a
23 smoke." Leaves the kids inside; outside for a
24 cigarette. And then he he'd come back in, "Oh,
25 what did I miss?" 20 minutes later, no matter

14

Plaintiff's Opening Statement

1 who's in, no matter what the score is, "I got to
2 take a smoke," and that was the course of this
3 man's life.

4 I want to talk to you a little bit about
5 the legal claims in this case, I know the
6 defense is going to talk a little bit about
7 that, and I just want to clarify a couple
8 things.

9 First of all, there is not a claim in
10 this case by the plaintiff, and we know the
11 warnings changed, right, over the years, there
12 is not a claim in this case that these legal
13 warnings were inadequate; and, therefore, we
14 have a right to have a lawsuit against Philip
15 Morris in this case. There is no claim about
16 that. That's their defense.

17 Our claim is that what they did and what
18 they actually but into these cigarettes, and
19 what they said, that's the basis of the claim:
20 What they told the American public, what they
21 did to the American public, Jesse Williams being
22 a part of it, that's what creates the claim in
23 this case.

24 Now there are some words for it, and
25 we're going to hear more about this at the end,

15

Plaintiff's Opening Statement

1 but in a couple of words, product liability
2 defect, because what Philip Morris put into the
3 cigarettes was different from what people
4 expected.

5 People thought cigarettes have tobacco.
6 What Philip Morris did was to create nicotine
7 delivery systems that use chemical enhancement
8 to make it so the kick from cigarettes was
9 harder and that in the course of doing that,
10 they created a higher market share for
11 themselves to the point now where cigarettes
12 sold by Philip Morris are almost half of the
13 United States market, and Marlboros are over
14 one-third of the cigarettes sold in the United
15 States. And these things were beyond consumer
16 expectations about what a cigarette is all
17 about.

18 Second, what Philip Morris did was
19 negligent. It was negligent; that they did not
20 behave as a reasonable manufacturer would. Now,
21 in regard to this, you can take into account
22 what Jesse knew, what Jesse was told, and you
23 can also take into account what Jesse -- who
24 Jesse was, and you can also take into account
25 who Philip Morris is, and who had the broadest

16

Plaintiff's Opening Statement

1 space of information.

2 There is going to be a war in this case
3 in this courtroom about what did Jesse know.
4 And you're going to have to go through it.
5 Philip Morris has gone back to the school books
6 that he had about the dangers of tobacco or the
7 bad things of tobacco from back in the 40s.

8 And on the hand, the plaintiff was going
9 to be presenting evidence from back then about
10 how the weight of what people saw and the images
11 of what people saw about cigarettes and tobacco
12 created an altogether different image. It was
13 glamorous.

14 The Marlboro man with the tattoo appealed
15 to a guy coming back from the service who had
16 just fought for his country. The Marlboro man
17 was a person who had life that was full of
18 adventure, and that that Marlboro man image
19 appealed to Jesse Williams and he stuck with it
20 over the course of his life.

21 The actual medical causation in the case
22 in the claim by the plaintiff is that the
23 cigarettes that Jesse Williams smoked, from 1988
24 to when he died in 1997, were a substantial
25 factor in causing his cancer. Now, this is an

Plaintiff's Opening Statement

1 important point, not the only cause, but a
2 substantial factor.

3 In other words, substantial means not
4 insignificant. At the end of the case, the
5 judge will give you a jury instruction called
6 causation, and if you have questions about what
7 does causation mean, how certain do we have to
8 be that those cigarettes after 1988 caused Jesse
9 Williams' cancer, that's the standard against
10 which you will apply the evidence that you've
11 learned and what you will hear from his treating
12 doctors.

13 Now, I'm not talking about some doctors
14 brought in by either side after this became a
15 lawsuit. I mean the people who treated Jesse
16 Williams because he was their patient. The
17 testimony from these local physicians will be
18 that those cigarettes were a substantial factor
19 in causing his death. And in fact, Dr. Segal,
20 who is his treating physician, testified and
21 will testify and wrote in this letter,
22 "Mr. Williams' lung cancer" -- can you see it?
23 "was almost certainly caused by cigarette
24 smoking. He smoked two packs a day for 45 years
25 when his lung cancer was diagnosed, and he

Plaintiff's Opening Statement

1 continued to smoke until his death."

2 Did you hear that? You didn't know that
3 yet, did you? He continued to smoke after he
4 was diagnosed. He tried to quit and could not
5 quit, and I'm going to tell you the story about
6 how Jesse Williams lived his final five months
7 because that's how long he lasted after his
8 diagnosis.

9 First of all, though, let's get a little
10 time context. This is Jesse Williams at work
11 shortly before he retired, Martin Luther King,
12 you guys recognize that kind of stairway, those
13 of you that went to Portland public schools?
14 This is the school, isn't it? That's him.
15 That's him before he retired in '92.

16 Now, he has pretty good health. He had a
17 ruptured appendix and that was bad. He had
18 peritonitis, and that was pretty bad. He even
19 had reported that he had some exposure to
20 asbestos, although there is no evidence that any
21 of these three things had anything whatsoever to
22 do with his death.

23 He retired in 1992. It's not like he
24 quit working. He had a little business, a
25 little janitorial business that he did on the

Plaintiff's Opening Statement

1 side. He had done it for years. It didn't have
2 a name, I don't think. It was basically Jesse
3 Williams working for some long-time customers.

4 And in 1996, basically what he was doing
5 was he was doing his gardening and taking care
6 of a couple of his accounts still cleaning. The
7 role that he had in his family was as provider

8 and father. His health had deteriorated. He
9 has been getting bronchitis more and more
10 frequently.

11 And in fact, in 1996, he got a bronchitis
12 that just didn't seem to go away. He lost 27
13 pounds in six months. Mayola Williams noticed
14 it and made him go in. Let me tell you
15 something, Jesse Williams was not a guy that
16 liked to go to the doctors.

17 He had a little bit of bloody phlegm that
18 he was coughing up, and he was wheezing at
19 night, so he went in in October of '96. And he
20 had tests done and it was determined that he had
21 lung cancer, and Judge Brown has told you about
22 that. Adenosquamous is lung cancer. In fact,
23 it was advanced.

24 It was inoperable. He went through
25 chemotherapy. He went through radiation. He

20

Plaintiff's Opening Statement

1 had good doctors. They did everything they
2 could, but they couldn't save him.

3 This is his death certificate, anybody
4 ever seen a death certificate? It is an
5 official form. I just wanted to show you. I
6 may not be able to do a very good job of it, but
7 it is written by Dr. Wright. I am going to try
8 to read it to you.

9 It lists three things that led to his
10 death: Cardiopulmonary arrest. You can't see
11 this very well. It lasted ten minutes.
12 Hemoptysis -- did I say that right, Bill? That
13 means that he was bleeding through his airway
14 and out his mouth and nose, that lasted 20
15 minutes. And Stage Three B, non-small cell lung
16 cancer that he had for five months.

17 Now, how that translates -- boy, I am
18 going to have to fly -- you know what his
19 medical treatment was. In March 1997, he went
20 to work. It was a weird day, though. He took
21 Freida (ph) and Joanne, two kids. He didn't
22 like anybody to help him work. He didn't like
23 any help, he wanted to do it himself.

24 What they did was they went over -- this
25 is over near Lincoln High School. See the West

21

Plaintiff's Opening Statement

1 Hills here? I took this picture. This is one
2 of his buildings. He did this building. The
3 day that he died, Freida and Joanne went and
4 helped him. He didn't want their help, but they
5 made him. He was getting real weak.

6 And that day he kept saying, "Oh, you
7 girls are working too hard, sit down," and they
8 wanted to talk to him. He came home that night,
9 has their supper, he was feeling real weak, went
10 to bed like usual, and Mayola Williams will tell
11 you, it was weird. Jesse was not a guy -- he
12 was not a man of a lot of words. That night he
13 was so affectionate, she didn't understand it.

14 She thought, maybe he is making a turn
15 for the better here. At 2 o'clock in the
16 morning, he woke up, couldn't catch a breath.

17 He had a wastebasket by the bed, so he could
18 spit in it because he had a lot of stuff coming
19 up because of his cancer. She said, "Honey, are
20 you okay?" He said, "Oh, I'm fine, I'm fine."
21 So she gets up, she comes around and
22 turns on the light, looks over, and he is
23 actually like -- and I'm sorry to do this to
24 you, but he's vomiting -- it looks like he's
25 vomiting blood.

22

Plaintiff's Opening Statement

1 It is hemoptysis. What's happened is, is
2 that his lung cancer has gotten to the point
3 where it has so weakened the structure of his
4 chest, one of his arteries has burst and the
5 blood is now coming out through his airway. He
6 is breathing blood. I mean, streaming blood.
7 She gets on the phone, 911, "Honey, you stay
8 there, you stay there."
9 He says, "I got to get up. I got to go
10 to the bathroom, Honey," and he's just got blood
11 of all over him and doesn't realize what's going
12 on. She is on 911, and he just won't listen to
13 her. He gets up and goes into the bathroom.
14 He's just got blood coming down his face.
15 And he goes in and he sits on the toilet.
16 She says to 911, "He went to the bathroom. What
17 am I supposed to do?" They said, "Stay on the
18 phone, we have ambulance coming." She goes in
19 to check on him, and what she finds is him on
20 the toilet, sitting on the toilet, kind of
21 slumped down like this. And the blood is no
22 longer pouring out of him, but it is just a big
23 long drool of thick blood, and he is dead.
24 Joanne Williams was living with him, the
25 daughter, came in, checked his pulse, he didn't

23

Plaintiff's Opening Statement

1 have a pulse. He died. He was dead. He smoked
2 and he worked on the day that he died. And this
3 is the last picture we have of him. He wasn't a
4 hat wearer now, but he didn't have any hair from
5 the chemo, so there is he is. That's the last
6 picture of him.
7 Okay. Well, you heard what you said
8 before his diagnosis. You know what he said
9 after his diagnosis? The evidence is going to
10 be, "Honey, those suckers are killing people. I
11 believe it now and now look at me."
12 So what he did was he asked Mayola
13 Williams and his daughter, Joanne, to help him
14 to make them pay, Philip Morris, for what they
15 have done because he felt betrayed. He had
16 believed them. They're the ones who know what
17 they put in the cigarettes, and this lawsuit is
18 the result of that.
19 Now, you are going to be paying good
20 attention listening to the evidence. It's not
21 going to be easy, but it is not anything
22 compared to what you have to do at the end,
23 because at the end of the case, you are going to
24 have to decide, well, what responsibility did
25 Jesse Williams have for this, based upon what he

Plaintiff's Opening Statement

1 knew, and what responsibility did Philip Morris
2 have for this based upon what they knew and what
3 they said and what they did.

4 Now, I don't have much time, so I am
5 going to give you a couple of legal concepts
6 that I would at least like for you to have in
7 the back of your minds. In regard to the
8 product liability and the negligence claims, we
9 said that we accept responsibility for what
10 Jesse Williams did.

11 Does Philip Morris accept responsibility
12 for that what they did? We're going to find out
13 in a few minutes when Mr. Cofer talks to you,
14 but it is anticipated from the denial of the
15 allegations in the complaint that they're going
16 to take an approach that goes like this.

17 One, it's not proven that cigarettes
18 cause cancer. Two, cigarettes didn't cause this
19 cancer. And three, even if cigarettes do cause
20 cancer, Jesse Williams knew what he was doing.
21 Now, you're going to have to think your way
22 through that and make up your mind about who
23 shares responsibility based upon what you've
24 seen and what you will see about how this
25 company has behaved from the beginning when it

25

Plaintiff's Opening Statement

1 found out that this product may be a problem.

2 And if, at the end of the case you
3 decide, and this is separate from the causation,
4 but if you decide that Jesse Williams was more
5 at fault, it is just like in a car accident, if
6 Jesse Williams had greater responsibility, more
7 than 50 percent for what happened relative to
8 Philip Morris, if he was more at fault than them
9 in what happened, he loses.

10 However, if he was less at fault than
11 they were, he loses the percentage of his own
12 fault, but so long as they're more responsible
13 than him, if they're greater than 50 percent,
14 what happens is that he pays the price for his
15 responsibility because his damages are reduced,
16 not by you, but by the judge.

17 Now, damages: There are three kinds of
18 damages, but there is basically two kinds for
19 purposes of the production here, and you are not
20 going to have to decide under the first type
21 which are compensatory damages who is supposed
22 to get what. That's not something that you're
23 involved with. It is to the estate, the damages
24 that you provide.

25 The parties have agreed, under

26

Plaintiff's Opening Statement

1 compensatory damages, that what Jesse Williams'
2 medical bills were, these are economic damages,
3 were \$20,801. And they're not agreeing --
4 Philip Morris is not agreeing to be responsible
5 for it, but we're agreeing that that is what his
6 medical bills were, and that his funeral was
7 \$684. Those are his economic damages. That's

8 pretty easy.

9 Noneconomic damages, however, in this
10 case, are a little more difficult. Those of you
11 who have jury experience know it includes some
12 concepts, and you're going to learn about them
13 at the end and I'm just going to highlight them
14 for you, the loss, care, support and love that
15 this family, Mayola Williams and his six
16 children have from the loss of their father and
17 husband at age 67, when he has an approximate
18 life expectancy of 80 years.

19 The loss to his estate by him dying early
20 in terms of any financial income he would have
21 had, and the pain and suffering that Jesse
22 Williams had from when he got diagnosed in
23 October of '96, to when he died in March of
24 1997, and a ceiling above which you cannot go
25 for this is one million dollars.

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Plaintiff's Opening Statement

1 So that's the first type of damages. And
2 that's to be calculated by the jury if it gets
3 beyond the liability considerations that I told
4 you about before.

5 Now, there is another type of damages
6 that you get to in this case if you decide that
7 Jesse Williams was not more greatly at fault
8 than Philip Morris, and this is a separate,
9 completely different calculation that exists
10 without regard to where these damages go, what
11 happens to these damages, and they're called
12 punitive damages.

13 The consideration is how much money would
14 it take to make it so that Philip Morris, if
15 they behaved in a willful and wanton manner,
16 without disregard for the health and the safety
17 for their customers, including Jesse Williams,
18 how much would it take to punish them and to
19 deter them.

20 And as a part of that, and not to make
21 Philip Morris into some kind of target, but for
22 you to understand what their financial situation
23 is, if we get to this point in the case, we'll
24 be presenting evidence to you that briefly is
25 Philip Morris is one of the biggest, most

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Plaintiff's Opening Statement

1 profitable companies in the world.

2 Cigarettes are two-thirds of their
3 income, but they have diversified based upon the
4 cigarette money that they made in this century,
5 to the point where they're now part of a holding
6 company that has other non-tobacco-related
7 companies, but while those companies account for
8 50 percent of their gross receipts, those other
9 companies only account for a third of the
10 profits.

11 Did I say that wrong? No, I didn't. I
12 think I got it right. I am getting confused
13 now. Let me look at my notes. Sorry. That's
14 right. Cigarettes are two-thirds of the income
15 of the holding company that owns Philip Morris.
16 It is an extremely profitable business.

17 So I am out of time. Did I forget
18 anything? I am out of time. We're at the
19 present. I am not going to get to talk to you
20 until the end of the case. We appreciate your
21 attention. This is not going to be an easy
22 time.

23 But believe me, it's going to be
24 interesting, it's going to be challenging, and
25 remember this, those of you who have had jury

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Plaintiff's Opening Statement

1 experience know it, the real work in this case,
2 it's going to begin when all this stuff, all
3 these exhibits go to you and you have the job to
4 make justice, and we'll accept your verdict.
5 Thank you.

6 THE COURT: Thank you, Mr. Thomas.

7 Jurors, while the plaintiffs disassemble
8 their exhibits, and the defense sets up, if you
9 want to stand and stretch, do that. We'll stay
10 here in court. Feel free to stretch your legs a
11 little bit while we get organized.

12 (Pause in proceedings.)

13 THE COURT: We'll need to have everyone
14 take a seat. If you're in the courtroom, you'll
15 need to be seated, sir. There are seats. Have
16 a seat, please.

17 All right, Mr. Cofer.

18 MR. COFER: Thank you, Your Honor.

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Defendant's Opening Statement

1 OPENING STATEMENT

2

3 BY MR. COFER:

4 May it please the Court, counsel,
5 Mrs. Williams, members of the jury: We talked
6 yesterday, but just to remind you, I'm Walt
7 Cofer. I represent Philip Morris. We talked
8 yesterday about there being two sides to every
9 story.

10 I don't know whether any of you remember
11 Paul Harvey, he is a popular radio commentator,
12 and he would always tell the rest of the story.
13 Well, you've heard in some detail from both
14 Mr. Gaylord and Mr. Thomas the evidence that
15 plaintiff will present, and they've told you
16 really their themes and what they believe this
17 case is about.

18 Now it's my turn on behalf of Philip
19 Morris to tell you the evidence that we will
20 present to tell you what we think this case is
21 about, to tell you, in essence, the other side
22 of the story.

23 And Mr. Thomas did anticipate a number of
24 the things I'm going to say, so I am going to
25 tell you this, I am going to talk about Philip

Defendant's Opening Statement

1 Morris and its responsibility, its obligation to
2 manufacture a safe product, the safest product
3 they can, and what its done to meet that
4 obligation.

5 I'll tell you what I am going to talk
6 about first, and that isn't going to surprise
7 you, I am sure, I am going to tell you what I
8 think this case is about. Members of the jury,
9 this case is about Jesse Williams and whether
10 his family is entitled to recover money damages
11 because Mr. Williams chose to smoke Marlboro
12 cigarettes.

13 Now, in a nutshell, there will be two
14 issues at the end of the case which you will be
15 asked to decide. The first is, who is
16 responsible for Mr. Williams' decision to begin
17 and continue smoking?

18 And second, have plaintiffs proven that
19 cigarettes purchased after September 1, 1988,
20 caused Mr. Williams' cancer, not can cigarettes
21 cause cancer, not do cancer cause most lung
22 cancer, but has plaintiff carried her burden of
23 proving to you that cigarettes purchased after
24 September 1, 1988, caused Mr. Williams' cancer.

25 Now, that date's important because

Defendant's Opening Statement

1 Judge Brown will instruct you that in Oregon
2 claims for the sale of products can only go back
3 so far in time. That's Oregon law. That is not
4 a special rule for tobacco. That applies to the
5 sale of products across the board, so plaintiffs
6 must prove that it's cigarettes sold after
7 September 1, '88, that caused Mr. Williams'
8 cancer.

9 Now, the evidence will be that from the
10 time Jesse Williams picked up his first Marlboro
11 cigarette, he was already on notice that
12 cigarette smoking was linked to lung cancer.
13 Over the years, he was repeatedly told by his
14 family, his friends, his doctors, the newspapers
15 and magazines that he read, and the Government,
16 that he should stop smoking because smoking was
17 harming his health and could cause lung cancer.

18 And plaintiff won't deny that he had that
19 information. Plaintiff will concede he had that
20 information. And the witnesses will describe
21 Jesse Williams as a bright, independent, well
22 read, smart man. But in essence, what they will
23 tell you is that none of that information
24 mattered because they'll say he was addicted to
25 nicotine.

Defendant's Opening Statement

1 Members of the jury, before you jump to
2 that conclusion, let's consider the facts. The
3 evidence will be that according to the Center
4 for Disease Control, 50 million persons have
5 stopped smoking for good. 90 percent of those
6 have stopped with no outside help; and, in fact,
7 eleven members of Mr. Williams' own family have

8 quit at one time or another.

9 Now, plaintiffs will have you believe
10 that Mr. Williams was different, but as you
11 listen to their case, you ask yourself, where is
12 that evidence? Where is the evidence that
13 Mr. Williams was any different than those 50
14 million Americans who quit. Where is the
15 evidence that Mr. Williams was any different
16 than the eleven members of his own family that
17 quit?

18 In Mr. Gaylord's remarks, he said
19 something about cigarettes not being effectively
20 regulated, so let's just switch to a new topic,
21 let's shift gears, let's talk about cigarettes.
22 Cigarettes are probably the most heavily
23 regulated consumer product in history.
24 Advertising is regulated by the Federal Trade
25 Commission, and has been since the 1930s.

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Defendant's Opening Statement

1 In 1955, the FTC told Philip Morris and
2 the other companies, "You cannot disclose tar
3 and nicotine levels in your ads. You can't tell
4 the public that." In 1966, the FTC changed its
5 mind and said, "Okay. You can provide that
6 information, but you don't have to."

7 In 1970, the Federal Trade Commission
8 changed its mind yet again and said, "You must
9 disclose tar and nicotine levels, and what's
10 more, we're going to tell you how to measure the
11 amounts and we're going to tell you how to
12 report it."

13 Now, let me pick up on something
14 Mr. Gaylord said. He said there came a time
15 when cigarettes were -- I don't know his exact
16 words, but a product that was controlled, the
17 nicotine was controlled.

18 Well, you bet, there did come a time when
19 manufacturing processes became available, that
20 you could consistently make a cigarette that had
21 the same amount of nicotine in it and the same
22 amount of tar in it, and those products were
23 marketed and those levels were disclosed to the
24 consumers, so people could make a judgment of
25 what type of cigarette they wanted to smoke, so,

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Defendant's Opening Statement

1 yes, it was controlled.

2 Philip Morris works hard to make sure
3 they have a consistent product and those levels
4 are disclosed so consumers can make informed
5 decisions. One more thing about the FTC has
6 told my client what sort of claims it can make,
7 and what sort of claims it can't.

8 I think it was Mr. Gaylord or maybe it
9 was Mr. Thomas, the suggestion that earlier
10 in the century some companies made health
11 claims. Well, some companies did get aggressive
12 with there ads. The evidence will be this had
13 nothing to do with Jesse Williams, but it is
14 true that happened, and the FTC came down on
15 them big time, and said basically, "You can't
16 make health claims."

17 Why is this significant? Mr. Gaylord
18 showed you a bunch of documents, but one
19 document in particular he showed you said, "The
20 Saratoga cigarette, a better cigarette
21 physiologically." It has a lousy taste, so it
22 wouldn't sell, and we couldn't tell the
23 physiological side of the story.

24 Two points, Philip Morris couldn't tell
25 the physiological side of the story. The FTC

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Defendant's Opening Statement

1 wouldn't let them. And the second point, the
2 cigarette tasted bad. Do you think cigarette
3 smokers are going to smoke a cigarette that
4 tastes bad? And I don't really think Philip
5 Morris can be blamed for not telling the
6 physiological story when the FTC wouldn't let
7 them. So that's just advertising.

8 Now, Mr. Gaylord talked about cigarettes
9 aren't a natural product. Let me tell you
10 something, the small amount of flavors that are
11 added to tobacco, the small amount of
12 ingredients that are added to tobacco as flavors
13 are reviewed by the Food & Drug Administration,
14 and the Department of Health and Human Services.

15 Neither Government agencies has ever told
16 any of the companies that any of those should be
17 removed, including the ammonia compounds that
18 Mr. Gaylord talked about.

19 Warnings. Warnings are required on every
20 page of cigarettes sold in this country and
21 every single ad. Congress tells the companies,
22 including Philip Morris, exactly what those
23 warnings are to say, how big they are to be,
24 where they're to be placed, and when they're to
25 be changed.

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Defendant's Opening Statement

1 Since 1966 -- can you see this? I'll
2 show you, but the point is you'll get the drift,
3 by 1966, one of these warnings has been required
4 on every package of cigarettes sold in this
5 country by law. It has changed over time and
6 I'll talk about that, but the point is from
7 1966, every cigarette that Mr. Williams smoked
8 came from a package with the warning on the
9 side.

10 Now, Mr. Thomas told you about
11 Mr. Williams' smoking habits. Let's say he
12 smoked only two packs a day from 1966, that's 40
13 cigarettes a day. If you assume he looked at
14 that package only twice a day, that's 14 a week,
15 730 a year.

16 And over the 31 years that he smoked
17 cigarettes with the warning on the side, he
18 would have seen over 22,000 warnings that
19 cigarette smoking could be harmful to health or
20 could cause lung cancer, and that quitting
21 smoking greatly reduces serious risk to health.

22 The evidence is going to be that
23 Mr. Williams was a nice man from a nice family,
24 and cancer is a horrible disease. We all know
25 that. We all have experiences with cancer and

Defendant's Opening Statement

1 it is a horrible disease. And there is no
2 question that Mr. Williams is missed a great
3 deal by his family.

4 And I want to tell you something, it is
5 only natural for all of us to feel sympathy for
6 someone who has lost their husband, for someone
7 who has lost their father, but as jurors, it's
8 your duty to decide this case based on the
9 evidence that is presented in this courtroom,
10 not on sympathy, not on newspaper articles you
11 may have read, not on sound bites from 60
12 Minutes or documentaries, not on opinions that
13 you have heard other people express, but on the
14 evidence that's presented in this courtroom, and
15 applying the law that Judge Brown tells you to
16 apply.

17 So with that introduction, let's turn to
18 plaintiff's claim and let's preview what
19 evidence will be. First, let me tell you, this
20 is a legal document. It is the fourth amended
21 complaint, and in it, the plaintiff tells us
22 their legal theories, tells us basic facts about
23 Mr. Williams, and tell us why they think Philip
24 Morris should be responsible, and why they're
25 entitled to recover.

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Defendant's Opening Statement

1 Now, according to this complaint,
2 Mr. Williams began smoking Marlboro cigarettes
3 in 1955. Where was he in his life? He was 26
4 years old. He was a veteran, having served his
5 country in Korea. He was married to
6 Mrs. Williams. He was a father.

7 The evidence will be that the first time
8 that Mr. Williams picked up a Marlboro
9 cigarette, he was an adult making adult choices.
10 Here are plaintiff's legal theories. This won't
11 be exactly the way the Court instructs you, but
12 this will be close enough to get the idea.

13 First theory, strict products liability.
14 The plaintiff's claim that Marlboro cigarettes
15 are defective and more dangerous than the
16 ordinary consumer would expect. Second,
17 negligence. The plaintiff's allege that Philip
18 Morris acted unreasonably in manufacturing and
19 selling Marlboro cigarettes.

20 And their third claim is what is known as
21 their deceit claim. They'll argue that Philip
22 Morris somehow deceived Mr. Williams about the
23 dangers of smoking. With plaintiff's claims in
24 mind, we can divide all of the evidence that
25 Philip Morris will introduce in this case into

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Defendant's Opening Statement

1 one of four categories.

2 The first, awareness or consumer
3 expectations will address plaintiff's strict
4 liability claim that cigarettes are more
5 dangerous than the ordinary consumer would
6 expect, and plaintiff's deceit claim, that
7 Philip Morris somehow deceived Mr. Williams.

8 Let's just briefly preview what the
9 evidence will be. The evidence will be that the
10 ordinary consumer has long known that cigarette
11 smoking may cause lung cancer, and if you start
12 smoking, you may have trouble quitting.

13 The evidence will demonstrate that at all
14 times there was enough information to make a
15 complete and accurate and voluntary and a
16 reasonable decision whether to smoke.

17 The second category of evidence,
18 reasonable conduct. This addresses plaintiff's
19 negligence claim. Plaintiff's claim that Philip
20 Morris acted unreasonably in manufacturing and
21 selling cigarettes. We have all touched on this
22 already. It came up in jury selection
23 yesterday, and Mr. Gaylord mentioned it and I
24 think even Mr. Thomas mentioned it, but to
25 understand the judgments that Philip Morris has

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Defendant's Opening Statement

1 made about smoking and health, you have to
2 mentally transport yourself back in time to the
3 '50s.

4 People have said that things were
5 different, times were different, science was
6 different, and although it was common knowledge
7 for decades that there were risks associated
8 with cigarette smoking, this is when science
9 first began looking at the issue systematically.

10 Many of the instruments that we rely on
11 today to measure and analyze things that smoke,
12 they didn't exist then. Philip Morris and
13 others had to work to invent technology and come
14 up with techniques which would allow them to
15 study the composition of smoke with very small,
16 minute amounts of smoke. The evidence will be
17 Philip Morris acted reasonably.

18 Now, at the same time, studies were
19 coming out which linked cigarette smoking to
20 cancer, and we'll talk about that. These early
21 studies did not prove that smoking caused lung
22 cancer, but they raised a lot of questions and
23 sparked a lot of debate, both within the
24 scientific community in general and within
25 Philip Morris.

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Defendant's Opening Statement

1 What did Philip Morris do about it?
2 Along with others, they set up an independent
3 research institute to study the problem and
4 address the criticisms. The other thing they
5 did was they changed their product.

6 You will hear how Philip Morris worked
7 with the National Cancer Institute and the
8 Federal Government, and other tobacco
9 manufacturers to make what the Natural Cancer
10 Institute describes as a less hazardous
11 cigarette.

12 You'll hear how those tar and nicotine
13 levels had dropped 70 percent from the 1950s,
14 the tar and nicotine has come down 70 percent
15 since the 1950s when those studies first came
16 out. And finally what you'll hear is that

17 nothing was hidden from the public.
18 Philip Morris, the Government, the public
19 health community had the same information and
20 the same opportunity to express their opinions
21 about what that evidence did and did not prove.
22 This takes us to our third category,
23 cancer, what we know and what we don't. There
24 are three basic facts, three basic facts about
25 smoking and lung cancer. Fact number one,

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Defendant's Opening Statement

1 statistically more smokers get lung cancer than
2 nonsmokers. That's a fact. Fact number two,
3 nonsmokers get lung cancer, too. There are
4 things other than cigarette smoke that we are
5 all exposed to every day that are suspected in
6 causing lung cancer. That's fact number two.
7 Fact number three, and I expect this will
8 surprise you, 90 percent of smokers don't get
9 lung cancer. Nine out of every ten smokers
10 don't get lung cancer. Now, those are the three
11 basic facts, and what they tell us is there is
12 an awful lot about cancer that we don't know and
13 we don't understand.

14 And first of all, cancer is not a single
15 disease. There are many types of cancer. There
16 are many types of lung cancer. Some are
17 associated with cigarette smoking and some
18 aren't. The fact that someone gets lung cancer,
19 that doesn't tell you what caused the cancer.
20 Nonsmokers get lung cancer, too.

21 If you took the cancer cell from a
22 nonsmoker and put it under a pathologist's
23 microscope, and you took a cancer cell from a
24 smoker and put it under that same microscope
25 side by side and look at them, they look the

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Defendant's Opening Statement

1 same. You can't tell what causes a cancer by
2 looking at it.

3 Another important fact: A cancer can
4 start in one part of the body and metastasize or
5 spread to another part. The fact that a cancer
6 is found in the lung doesn't mean it started in
7 the lung. In a nutshell, that's what we know
8 about cancer.

9 Our final category, the ability to quit
10 smoking. Plaintiff will tell you that
11 Mr. Williams didn't quit because he couldn't
12 quit; that nicotine had somehow compromised his
13 freewill to choose; that he was somehow
14 different from everyone else.

15 There will be no evidence that he was
16 different from everyone else. There will be no
17 evidence that he was different from those 50
18 million Americans that quit. There will be no
19 evidence that he was different from the eleven
20 members of his family that quit. In fact,
21 members of the jury, the evidence will be to the
22 contrary.

23 The evidence will be that Mr. Williams
24 was a well informed, decisive, strong willed
25 person who made his choices about what he

Defendant's Opening Statement

1 enjoyed and how he wanted to live his life.

2 So that's the big picture. Let's now
3 turn to details. I have a time line, we're all
4 big on time lines today, that will help me walk
5 you through some of the key factors. Let me
6 start out by repeating some of the things
7 Mr. Gaylord said, and that is tobacco and
8 health, the issue of tobacco and health.

9 That's not a new issue. That's older
10 than the country itself. In 1492, hundreds of
11 years before Philip Morris came into existence,
12 Columbus arrived in America. He wrote in his
13 diaries that he saw the Native Americans smoking
14 tobacco and had observed the difficulty they had
15 in going with out it.

16 What's important about that? Hundreds of
17 years before Philip Morris was even around
18 people were smoking tobacco. Philip Morris
19 didn't invent smoking. It is a custom that has
20 a long history, but let's jump forward to the
21 events in Mr. Williams' lifetime. Let's focus
22 on what was going on when he growing up. Let's
23 focus on how the evidence developed.

24 Let's start with just some basic
25 biographical facts about Jesse Williams. You

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Defendant's Opening Statement

1 can probably see that I have Williams' facts in
2 red, and I have smoking and health facts in
3 blue.

4 But as you heard, Mr. Williams was born
5 in 1929 in Crockett, Texas. He lived, grew up
6 and went to school there. June of 1948, he
7 joined the Army, and it was some time in 1950,
8 he was stationed in Korea and he began smoking.

9 Now, you heard reference to early tobacco
10 ads. There will be no evidence that ads had
11 anything to do when Mr. Williams began smoking.
12 In fact, counsel conceded Mr. Williams began
13 smoking because he was told that smoke would
14 keep the mosquitoes off.

15 Sometime in the next year, Mr. Williams
16 met Mrs. Williams, and I believe it was
17 Christmas Eve of '52 that they were married,
18 Mr. Williams was discharged from the service in
19 June of 1953. Now, in her deposition,
20 Ms. Williams testified that in the early years
21 of their marriage, Mr. Williams smoked less than
22 a pack a day.

23 Now, let's look how the evidence linking
24 cigarette smoking to lung cancer was developing
25 at the same time. The evidence that ties

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Defendant's Opening Statement

1 cigarette smoking to lung cancer, basically
2 there are two types.

3 You heard about epidemiological or
4 statistical evidence, and then there is what is
5 called physiological or laboratory evidence.
6 The first epidemiological study about cigarette
7 smoking and cancer was published in 1950, and

8 what these researchers did is they looked at
9 people who had lung cancer and they found that
10 more of them were smokers than nonsmokers.

11 What that told them was there is a
12 statistical association between cigarette
13 smoking and lung cancer. Now, point one,
14 epidemiology was a brand-new science in the
15 '50s. Back then and even now, most scientists
16 agree that a statistical association between
17 something and a disease doesn't prove that that
18 something caused the disease, but despite these
19 limitations, these studies got a lot of
20 attention.

21 This takes us to 1953, and this is a key
22 point. Two researchers in St. Louis, Missouri,
23 Ernst Wynder and Evarts Graham, conducted the
24 famous landmark Wynder/Graham study. And what
25 these two prominent researchers did is they took

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Defendant's Opening Statement

1 a strain of mouse that was known to be
2 susceptible to developing skin cancer, a
3 specific strain, and they shaved their backs and
4 then they painted on a bunch of tobacco smoke
5 condensate, or tar, and they found that half the
6 mice developed skin tumors, half those mice
7 developed skin tumors because of tobacco smoke
8 condensate.

9 Now, a couple of caveats, the number of
10 cigarettes or rather the amount of condensate
11 necessary to produce those tumors was the
12 equivalent of smoking 650 cigarettes a day. A
13 lot of cigarettes, the researchers themselves
14 admitted they didn't know whether this study
15 applies to humans.

16 They said, "What it tells us is that
17 enough tobacco smoke condensate will produce
18 skin tumors on the backs of mice half the time.
19 We don't know whether that means that fresh
20 inhaled smoke will produce lung carcinomas in
21 humans," but notwithstanding that, these studies
22 got a bunch of publicity and were a really big
23 deal.

24 This takes us to 1954. Mr. Gaylord
25 showed you The Frank Statement. He showed you

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Defendant's Opening Statement

1 some statements in The Frank Statement and
2 suggested that Philip Morris made some promises
3 it didn't keep.

4 Well, during this case, I will address
5 that, but I want to show The Frank Statement for
6 another purpose. I want you to focus on the
7 first two paragraphs, and let's read it
8 together. This is 1954. Let's me tell you
9 first, let me give you the background of what
10 The Frank Statement is.

11 This was published -- can you see it
12 everyone? Those are the first two paragraphs.
13 This was an ad that was published in every,
14 major newspaper in this country, January 4th,
15 1954, including The Oregonian. It was paid for
16 by a number of sponsors, including Philip

17 Morris.
18 The purpose of the ad was to announce the
19 formation of the Tobacco Industry Research
20 Council. Does that make it better or worse?
21 Better? All right. Let's read this together.
22 January 4th, 1954, Philip Morris paid to
23 put this ad in The Oregonian and other
24 newspapers, "Recent reports on experiments with
25 mice," Wynder/Graham, "have given wide publicity

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Defendant's Opening Statement

1 to a theory that cigarette smoking is in some
2 way linked with lung cancer in human beings.
3 "Although conducted by doctors of
4 professional standing, these experiments are not
5 regarded in as conclusive in the field of cancer
6 research. However, we do not believe that any
7 serious medical research, even though its
8 results are inclusive should be disregarded or
9 lightly dismissed."
10 The evidence when be that the Philip
11 Morris acted reasonably and responsibly. These
12 early studies were not disregarded or lightly
13 dismissed. They led Philip Morris to fund
14 hundreds of millions of dollars in research with
15 organizations like the American Medical
16 Association, the American Cancer Society, the
17 National Cancer Institute, and some of the best
18 universities in this country.
19 Now, I mentioned this was published in
20 The Oregonian on January 1st, 1954. Jesse
21 Williams read The Oregonian. Let me tell you
22 about a couple other things that happened in
23 1954. A Gallop poll revealed that 90 percent of
24 the people polled in 1954 said they had recently
25 read or heard that cigarette smoking could be a

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Defendant's Opening Statement

1 cause of cancer in the lung.
2 In 1954, 90 percent said they had
3 recently heard or read that cigarette smoking
4 could be a cause of cancer in the lung. One
5 other interesting fact about 1954, that was when
6 the first plaintiff filed the first lawsuit
7 claiming that a cigarette company was
8 responsible for his lung cancer.
9 Now, again, in the fourth amended
10 complaint plaintiff tells us that Mr. Williams
11 began smoking in 1955, 26 years old, a veteran,
12 an adult making adult choices, a husband and a
13 father. He began smoking Marlboros two years
14 after the Wynder/Graham, one year after The
15 Frank Statement, one year after the Gallup poll.
16 As I said in the beginning, the evidence
17 will show that from the time Mr. Williams picked
18 up his first Marlboro cigarette, he was already
19 on notice that cigarette smoking was linked to
20 lung cancer.
21 This take us to 1964. In 1964, the
22 original Surgeon General's Report was published.
23 This was a landmark in American culture and
24 smoking and health. In this report, the Surgeon
25 General conceded that statistical methods, that

Defendant's Opening Statement

1 is epidemiology, statistical methods cannot
2 establish proof of a causal relationship, and
3 this is the Surgeon General's language, members
4 of the jury, "the causal significance of an
5 association is a matter of judgment."

6 Now, the Surgeon General went on to make
7 two major judgments in that report. Judgment
8 number one, that smoking is causally associated
9 with development of lung cancer, and I'll get to
10 this in a minute, tuck this in the back of your
11 minds, this is a big one, in 1964, the Surgeon
12 General, after surveying all the literature
13 said, "I make the judgment cigarette smoking
14 should be characterized as a habit and not an
15 addiction."

16 It wasn't just Philip Morris, the Surgeon
17 General in 1964 said, "Cigarette smoking is a
18 habit, not an addiction." I hate to get out of
19 sequence, but it wasn't until 24 years later,
20 1988, even though these reports are published
21 every year, that the Surgeon General changed his
22 definition and changed his mind and then said,
23 "Okay. Let's call it an addiction," but I am
24 getting ahead of myself.

25 Two years later, 1966, Congress tells the

Defendant's Opening Statement

1 companies, "You put the Surgeon General's
2 warning on the package of every cigarette sold
3 in this country." From this point on, there was
4 never a single cigarette that Jesse Williams
5 smoked that didn't come in a package with a
6 warning on the side.

7 1969, Congress said, "We're changing that
8 warning, we're making it stronger." 1971, the
9 Federal Communications Commission gets in the
10 act, tells the companies, "No more ads on TV or
11 radio." 1972, the FTC jumps in, says, "Don't
12 just put the warning on the packs. It goes in
13 the ads as well.

14 1984, Congress says, "Change the words
15 again. This is the one, lung cancer and
16 quitting smoking now greatly reduces your risk.
17 This takes us to 1988.

18 The statute of repose. Let me get some
19 notes, I want to make sure I get this exactly
20 right, this is important. Judge Brown will
21 instruct you that in Oregon when someone sues
22 claiming injury from the use of a product, and I
23 previewed this, Oregon law limits how far back
24 in time the claim can go. Basically, that's a
25 decision that the Legislature of Oregon has

Defendant's Opening Statement

1 made.

2 Now, this is not -- and this is
3 important -- this is not a special rule for
4 tobacco. This applies to virtually every
5 product across the board. And what that means
6 is plaintiff is making no claim for Marlboro
7 cigarettes sold between 1955 and 1988.

8 What plaintiff must prove is that it's
9 the cigarettes sold after 1988 that caused
10 Mr. Williams' cancer. Those are the ones that
11 are defective, those are the ones that are
12 unreasonably dangerous, those are the ones we
13 were unreasonable in manufacturing and selling
14 the product, those are the ones that
15 Mr. Williams was deceived about.

16 There is no claim for any of these
17 cigarettes. Now, there is no claim from '50 to;
18 '55 for another reason, no one knows what brand
19 Mr. Williams started with. He smoked from '50
20 to '55. There is no allegation that it is a
21 Philip Morris product, so he didn't start with
22 Philip Morris, but he smoked Philip Morris.

23 This takes us to October of 1996,
24 Mr. Williams was diagnosed with lung cancer and
25 as Mr. Thomas detailed, in March of 1997,

55

Defendant's Opening Statement

1 Mr. Williams died.

2 Now, let's focus in more detail about
3 what the ordinary consumer's expectations have
4 been about cigarettes over the years. Members
5 of the jury, there is not a public health issue
6 in history that has received more sustained
7 attention than smoking and health. I challenge
8 you to think of any.

9 People have discussed it, people have
10 debated it, people have argued about it
11 literally for decades. And this debate did not
12 occur in a basement or a secret laboratory
13 somewhere, our some exulted ivory tower. It
14 occurred in Congress; on the front pages of
15 newspapers; in people's homes, including the
16 Williams' home; and it occurred at Philip
17 Morris.

18 Mr. Thomas touched on this, but in the
19 '50s when Mr. Williams began smoking, things
20 were different. One-half of adults in this
21 county smoked. 90 percent of them smoked
22 unfiltered cigarettes. Our Government gave
23 cigarettes to soldiers during times of war.
24 They gave them to Mr. Williams during the Korean
25 War.

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Defendant's Opening Statement

1 Through the years, cigarettes have been
2 smoked by presidents, generals, movie stars,
3 athletes, public figures and regular people of
4 all types. But just to show our national
5 schizophrenia, at the same time cigarettes
6 enjoyed this popularity, they were consistently
7 criticized as being bad for you, causing bad
8 health and being immoral.

9 Mr. Thomas talked a little bit about what
10 people thought about cigarettes in the '20s and
11 '30s, and let me kind of fill that picture out a
12 little bit. By the turn of the century,
13 cigarettes were commonly referred to as coffin
14 nails, cancer sticks, little white slavers.

15 Thomas Edison and Henry Ford wouldn't let
16 their employees smoke. Ford wouldn't even hire

17 a smoker. At the turn of the century, 16 states
18 banned the sale of cigarettes. Here in Oregon
19 November 4, 1930, a constitutional amendment was
20 submitted to the voters of this state to outlaw
21 all smoking.

22 It is true the grade schools and high
23 schools that Mr. Williams attended were required
24 by law to teach the dangers of smoking, and they
25 did. Students at the school where Jesse

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Defendant's Opening Statement

1 Williams attended, if they were caught smoking,
2 they were chastised or spanked.

3 Jesse Williams' brother, Henry, testified
4 in his deposition, he was taught in high school
5 that smoking was harmful to health and could
6 cause the lungs to become dark.

7 The most popular magazine in the country
8 in the 1940s and 1950s was Reader's Digest. It
9 regularly ran articles critical to smoking. One
10 was then called, "Cancer by the Carton," and
11 Mr. Williams read Reader's Digest.

12 Effects of smoking was so well known that
13 they become part of our humor and our culture.
14 In 1947, the number one song in the country on
15 the Hit Parade was, "Smoke, Smoke, Smoke That
16 Cigarette." It referred to nicotine smokers as
17 nicotine fiends. Perhaps that song is familiar
18 to some of you. Mrs. Williams remembers it.
19 She testified that her parents owned a copy of
20 it.

21 Now in 1964, as I mentioned, the Surgeon
22 General's Report was front page news, and
23 Congress began debating, "Do we put a warning on
24 the package?" Different people had different
25 views. The executive vice-president of the

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Defendant's Opening Statement

1 American Medical Association testified to the
2 FTC, that a warning, quote, "Will not alert even
3 the young cigarette smoker to any risk of which
4 he is not already aware."

5 Then in 1968, Dr. Daniel Horne, who is
6 one of the early researchers who did, from the
7 American Cancer Society, did the epidemiological
8 study, 1968, Dr. Horne probably summed it up
9 best when he said, "You could stand on a rooftop
10 and shout, 'Smoking is dangerous,' at the top of
11 your lungs, and you would not be telling anyone
12 anything they didn't already know."

13 In short, members of the jury, the
14 evidence will be that the public and the
15 ordinary consumer have long known the risk of
16 cigarette smoking. Now, Jesse Williams lived,
17 went to school and worked in the real world.

18 Everyone who knew him describes him as
19 intelligent and well informed. He was a man who
20 started and ran his own business. And from the
21 time Mr. Williams was little, his mother told
22 him and his brothers and sisters that smoking
23 wasn't good for you and it would kill you. In
24 fact, Mr. Williams' mother specifically told him
25 his smoking with would kill him.

Defendant's Opening Statement

1 In 1951, when Mr. Williams came home on
2 leave, he hid his smoking from his parents.
3 Mr. Williams was an avid reader. He read Time
4 magazine from the 1950s to the 1970s. He read
5 Reader's Digest, I already mentioned the
6 Reader's Digest articles, and he read The
7 Oregonian from the 1950s until his death.

8 Let me just show you an sample of
9 headlines published in The Oregonian in 1954 and
10 1955, when Mr. Williams was reading it and
11 making a decision to smoke.

12 "Cancer peril seen in fags," of course,
13 fags was slang term for cigarettes. That's
14 February 22nd, 1954. "Scientists figure risk
15 percentages. A Harvard University scientist,
16 once a heavy smoker himself said Sunday, a
17 two-pack-a-day smoker multiplies his chances of
18 lung cancer 52 times," 1954.

19 June 22nd, 1954, cover of The Oregonian,
20 "American Cancer Society links cigarettes, life
21 span." Also in 1954, "Report of Cancer Society
22 points to cigarette smoking." 1955. In 1955,
23 The Oregonian, members of the jury, "Lung cancer
24 risk said cut when cigarettes are given up."

25 You've already heard Mr. Thomas tell you

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Defendant's Opening Statement

1 that Mrs. Williams used to urge her husband to
2 quit smoking, telling him the cigarettes would
3 kill him. His children told him the same thing.

4 Mr. Williams himself told his children
5 not to smoke. He told them it was a bad habit
6 and would rot their teeth. When he caught his
7 son, Calvin, secretly smoking, he chased him on
8 off the porch with a broom handle. When he
9 caught his other two sons, he gave them a big
10 lecture about it.

11 Mr. Williams himself used the words,
12 "cancer sticks," in referring to his cigarettes.
13 Other members of Mr. Williams' family used to
14 try to get him to quit. His brother-in-law,
15 Eddie, quit cold turkey in 1969, tried to
16 encourage Mr. Williams to quit.

17 Both of Mr. Williams' sisters told him he
18 should quit smoking. As I think Mr. Thomas told
19 you, the family became particularly concerned in
20 1970 when Mr. Williams developed a strong cough,
21 the family and his doctors attribute to
22 cigarette smoking.

23 The Court will instruct you that under
24 Oregon law a product is defective and
25 unreasonably dangerous only, only, if it is more

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Defendant's Opening Statement

1 dangerous than the ordinary consumer would
2 expect. The evidence will be that Jesse
3 Williams was an ordinary consumer.

4 The Court will also instruct you that
5 plaintiff can recover under her deceit claim
6 only if Mr. Williams was, in fact, deceived.
7 That is he was misled or did not have enough

8 information or the right information to make an
9 informed choice.

10 Now, the next thing I want to discuss is
11 whether Philip Morris has acted reasonably. And
12 I'm going to take the bait, because both
13 Mr. Thomas and Mr. Gaylord said, "Sure, Jesse
14 Williams made his choices, you make Mr. Cofer
15 tell you about Philip Morris' choices," and I
16 agree this case is about risk, it's about
17 choices, and it's about responsibility for those
18 choices.

19 And I am going to tell you, I am going to
20 preview for you, the choices that Philip Morris
21 has made and how its acted as a reasonable
22 manufacturer. First, I want to digress for a
23 moment and talk about some of the documents.

24 Mr. Gaylord showed you snippets of
25 documents, Philip Morris documents, Tobacco

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Defendant's Opening Statement

1 Institute documents, CTR documents that he
2 selected, and he suggested that those documents
3 taken out of context are representative of the
4 actions of the hundreds of individuals who have
5 worked at Philip Morris over the last 50 years.

6 Members of the jury, you are going to get
7 a chance to decide that and I am going to tell
8 you what I am going to do. I am going to bring
9 to the witness stand the people at Philip Morris
10 whose job it is to make cigarettes and test
11 cigarettes and improve cigarettes and sell
12 cigarettes, and they're going to raise their
13 right hand and they're going to look you in the
14 eye, and they're going to tell you what they
15 have done and what Philip Morris has done.

16 And Mr. Thomas and Mr. Gaylord can ask
17 them relevant questions until the cows come
18 home, and I'll leave it to you to judge whether
19 some snippets of documents taken out of context
20 are a better indicator of who Philip Morris is
21 and how it conducts itself or whether these
22 people's sworn testimony is.

23 One last thing on the documents, I am not
24 going to go through them one by one. We will
25 when we get to the trial, we will address those

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Defendant's Opening Statement

1 documents, but there are two documents that
2 suggest this INBIFO thing was just a big secret.

3 True, INBIFO is a lab in Germany that
4 Philip Morris owns to conduct high quality
5 animal research, that's certified by every
6 organization that can certify it, and it is
7 recognized as one of the finest laboratory in
8 the world that does that kind of work.

9 Now, with respect to those documents,
10 INBIFO kept every document. They've kept their
11 records fastidiously going all the way back to
12 everything they did, and those documents have
13 been produced in this country. Documents
14 weren't destroyed, research wasn't hidden, that
15 stuff is available.

16 Let me give one more common sense

17 observation. These bad documents that the
18 plaintiffs are showing you, where do you think
19 the bad documents come from? They came from
20 Philip Morris. We produced the documents. We
21 produced the bad documents that you're looking
22 at. I am not sure that is real consistent with
23 trying to hide information.

24 All right. I apologize, I got side
25 tracked. Conduct, Philip Morris, what has

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Defendant's Opening Statement

1 Philip Morris done? Well, they have done a lot
2 of things. First, the evidence will be when you
3 hear about it, they conducted research in their
4 own labs and they gave money to outside
5 researchers to study smoking and health.

6 What else did they do? Their scientists
7 attended meetings, they cooperated with
8 Government health officials. You'll hear about
9 the tobacco research. That's a story we're
10 proud of and that's a story we'll tell you.

11 Philip Morris invented technology that
12 helped scientists understand. Philip Morris
13 research and Philip Morris has published
14 hundreds of articles in scientific literature
15 that has contributed to an understanding of
16 cigarette smoking and health.

17 Second, Philip Morris didn't just study
18 how to make cigarettes better. I told you about
19 their work with the National Cancer Institute.
20 They helped produce a cigarette that the
21 National Cancer Institute has described as less
22 hazardous.

23 They brought their tar and nicotine level
24 down 70 percent. Plaintiffs will call that
25 controlling the product. You better they

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Defendant's Opening Statement

1 control the product. They studied the smoke,
2 they found ways to bring the tar and nicotine
3 levels down, they found ways to make effective
4 filtration, they found ways to use tobaccos and
5 methods that were less biologically active.

6 That is not a code word for cancer.
7 Biologically active don't mean cancer. Ask any
8 scientist, we'll ask them when they take the
9 stand, they don't mean the same thing, they're
10 not a code word. They actually improved the
11 product.

12 And I'll tell you something else you'll
13 hear, and this is an interesting and exciting
14 part of the story, right now Philip Morris is
15 test marking a revolutionary new product, one
16 that doesn't burn tobacco but heats tobacco.
17 You'll learn how this product is the result of
18 25 years of cutting edge technologies that were
19 literally unimaginable even five years ago.

20 You will hear about the collaboration,
21 the way scientists that literally invented
22 metals that the Department of Defense is
23 interested in, all sorts of hard work generally
24 focused on developing a safer product.

25 False controversy. Plaintiff has

Defendant's Opening Statement

1 suggested that Philip Morris misused science to
 2 create a false controversy. The fact is
 3 scientific investigation is going on right now,
 4 that's a fact. It involves areas of legitimate
 5 research, legitimate debate and legitimate
 6 disagreement.

7 The evidence will be that Philip Morris
 8 has made major contributions to understand
 9 smoking. Now, while everyone knows that if you
 10 smoke, you may have trouble quitting and you may
 11 get lung cancer, scientists don't understand why
 12 that is true or what to do about it.

13 Philip Morris admits that cigarette
 14 smoking may cause certain types of lung cancer,
 15 but no one knows what causes the healthy cell to
 16 turn bad. No one knows why 90 percent of
 17 smokers don't get lung cancer.

18 No one knows if smoking causes it all,
 19 why lung cancers are common -- well, not common,
 20 why there are lung cancers in nonsmokers, too.
 21 Nonsmokers get lung cancer, too. No one
 22 believes that smoking is the only cause of lung
 23 cancer. Aerosols, asbestos, rayon and chemicals
 24 are all suspected in causing lung cancer.

25 Members of the jury, what people disagree

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Defendant's Opening Statement

1 about is not the evidence but what the evidence
 2 means, and there is nothing wrong, let me make
 3 this clear, there's a lot of discussion on this,
 4 there is nothing wrong with using statistics in
 5 making public health decisions, to promote
 6 education, to discourage people from smoking, to
 7 provide information to consumers so they can
 8 choose whether to smoke, but the fact that
 9 Philip Morris may disagree in part with some of
 10 the judgments that are made does not mean that
 11 it acted irresponsibly.

12 In deciding whether Philip Morris acted
 13 reasonably, I submit to you the question you
 14 have to answer is not who's right or who is
 15 wrong, but has Philip Morris conducted itself
 16 responsibly based on the available scientific
 17 information, the available scientific evidence
 18 at the time.

19 You can relax, I am getting close.

20 You heard about the Council for Tobacco
 21 Research. Plaintiff has also suggested that CTR
 22 is a fraud and sham and mere public relations
 23 device. First, I would suggest that would
 24 probably come as news to the researchers who
 25 receive hundreds of millions of dollars in

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Defendant's Opening Statement

1 funding from CTR.

2 Let's look at the time line. The first
 3 epidemiological study comes out in 1950.
 4 Wynder/Graham, 1953; CTR formed, 1954. Pretty
 5 prompt. Second, let's look at the facts. CTR
 6 has given hundreds of millions of dollars to
 7 independent researchers who study smoking and

8 health. The money has gone to universities like
9 Harvard, Stanford, UCLA, Cal Berkeley.
10 The money has gone to independent
11 researchers, some of whom went on to win the
12 Nobel Prize in their field. CTR has
13 co-sponsored research with the likes of National
14 Cancer Institute and the American Cancer
15 Society.
16 More than 6,000 scientific articles have
17 been published as a direct result of CTR
18 funding, and this is the kicker, CTR research
19 has been published and CTR research has been
20 cited over 350 times by the Surgeon General in
21 the Surgeon General's Report.
22 Now, does Philip Morris and the other
23 sponsors anticipate a public relations benefit
24 from forming and funding CTR. Absolutely. Of
25 course they did. They were proud of it. They

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Defendant's Opening Statement

1 were proud of what they were doing. They
2 believed they were acting responsibly. They
3 wanted to tell the public about it.
4 What should they have done, kept it
5 secret? Kept this research a secret? What
6 would the claim be if they did that? None of
7 this detracts from the breadth of the research
8 or the quality of the research, and we'll tell
9 you about CTR.
10 A couple more points. Cancer. Can
11 plaintiffs prove that the Marlboro cigarettes
12 smoked after September 1st, 1988, caused
13 Mr. Williams' cancer? That's the question.
14 First, there is virtually no cancer that has
15 only one known cause.
16 Some cancers are believed to be caused by
17 exposure to the workplace or the environment or
18 lifestyle decisions, like diet. Other cancers
19 are believed to have no known cause, no cause
20 from any outside exposure. They just happen.
21 We know that genetics and heredity and family
22 history all play a role in whether someone
23 develops cancer.
24 Now, you say, "That's interesting,
25 counsel. What does that have to do with

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Defendant's Opening Statement

1 Mr. Williams?" Well, when he went to the
2 doctor, he told the doctor he had been exposed
3 to asbestos. We know he was a custodian, he
4 worked with cleaning solutions and chemicals,
5 and we know there are a number of people in
6 Mr. Williams' family who had cancer, including
7 nonsmokers like his daughter.
8 We know that often a cancer starts in one
9 part of the body and is found in another part.
10 We know that cancer was seen in Mr. Williams
11 lung. Did it start there? Was it a type of
12 cancer that is associated with cigarette
13 smoking?
14 The experts will tell you that when it
15 comes to cancer the best evidence is an autopsy.
16 One wasn't conducted here. We don't have as

17 much evidence as we'd like, but that's an issue,
18 is there enough evidence? Is there enough
19 evidence to reach that conclusion?

20 Last point, the ability to quit smoking.
21 The fact that there's nicotine in tobacco is no
22 secret. Nicotine occurs naturally in the
23 tobacco plant. The evidence will be that
24 cigarettes are not spiked with tobacco -- I am
25 sorry, cigarettes are not spiked with nicotine.

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Defendant's Opening Statement

1 Nicotine is not added to tobacco.

2 The cigarette is not manipulated in any
3 way to hook the smoker. In fact, the amount of
4 nicotine present in the cigarette is always --
5 it's usually less than the amount of nicotine
6 that is found naturally in the tobacco used to
7 make the cigarettes.

8 Let me repeat that: The amount of
9 nicotine that is in the cigarette the smoker
10 actually has is always substantially less than
11 the amount of tobacco that occurs -- or the
12 amount of nicotine that occurs naturally in the
13 tobacco used to make the cigarette. The process
14 of making the cigarette reduces the amount of
15 nicotine always.

16 In his opening statement, Mr. Gaylord
17 referred to ammonia compounds. Well, here is
18 the bottom line on ammonia compounds. The fact
19 that there is ammonia compounds in tobacco is no
20 secret. They occur naturally in tobacco.
21 Ammonia compounds are used in any number of
22 consumer products, milk, bread, beer, Twinkies.

23 Ammonia compounds impart the flavor,
24 that's why they're used. And finally, the
25 ammonia compounds have absolutely no effect on

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Defendant's Opening Statement

1 the amount or form of nicotine that gets to the
2 smoker. There will be no evidence that ammonia
3 or any of that stuff has anything to do with
4 Mr. Williams' decision to continue smoking.

5 So why do people smoke? You saw a
6 document that address it, why do people smoke.
7 There are lots of reasons. Taste, flavor,
8 relaxation. Well, let me tell you, there is no
9 doubt that one reason is nicotine. Just like
10 people drink coffee for caffeine, eat candy for
11 sugar, the fact that people smoke in part for
12 nicotine, that is not a secret. It is common
13 sense. People have always known that.

14 Was Mr. Williams addicted? Well,
15 depending on how you define addiction, I
16 suggest, members of the jury, the label doesn't
17 matter. Whether he was addicted or not
18 addicted, that doesn't mean that he could not
19 quit or that he isn't responsible for his
20 decision to quit.

21 Addiction is not a thing; it's a
22 judgment. So what that means is whether you
23 consider nicotine to be addicting depends on how
24 you define addiction. I told you in 1964, the
25 Surgeon General's definition was cigarette

Defendant's Opening Statement

1 smoking should be characterized as a habit and
2 not an addiction, even though other researchers
3 were publicly urging that he call it addictive.

4 In 1988, using a different definition,
5 the Surgeon General said, "Let's call cigarettes
6 addictive. That's what they should be called
7 now." But for the purpose of deciding whether
8 Mr. Williams was responsible for his decision to
9 smoke, the label isn't important, what is
10 important is the effect of the product on
11 Mr. Williams.

12 Did nicotine turn Mr. Williams into a
13 helpless victim? Did it cause him to lose his
14 ability to reason, to make judgments, to seek
15 advice, to ask for help, to go to the doctor?

16 The evidence will be that anyone who
17 really wants to quit smoking and makes up his or
18 her mind that they can quit smoking does quit
19 smoking. Now, don't misunderstand me, I am not
20 saying it is always easy. Some people have to
21 try, and try hard, and try again. But the
22 evidence will be that anyone who really decides
23 they're going to do it, gets it done.

24 As I told you when I first stood up here,
25 this case is about Jesse Williams and whether

Defendant's Opening Statement

1 his family is entitled to recover money damages,
2 because Mr. Williams choice to smoke.

3 As you listen to the evidence the
4 plaintiff presents over the next two weeks, ask
5 yourself, what does this have to do with Jesse
6 Williams? How did this document or this ad or
7 this testimony, how did it affect Mr. Williams?
8 And ask yourself, who is responsible for
9 Mr. Williams' decision to begin and his decision
10 to continue smoking?

11 I want to thank you for your attention.
12 It is going to be a few weeks before we have a
13 chance to put on our witnesses and tell you our
14 side of the story, and all I ask is that you
15 keep an open mind and stay tuned, and we'll get
16 back with you and we're going to tell you the
17 rest of the story. Thank you very much.

18 THE COURT: Thank you, Mr. Cofer.

19 Jurors, thank you for your hard work
20 today. Tomorrow we begin the evidence. I need
21 you in the jury room across the hall at 9:30.
22 I'll be working with the lawyers before then on
23 some matters so that we hope to be ready to go
24 at that time.

25 I understand those of you, those four of

1 you over there are wondering if you have special
2 status. You are, indeed, our alternate jurors.
3 The jury, under the Oregon Constitution, is
4 comprised of 12 jurors. There is a significant
5 investment by everyone, all of your jurors, in
6 the conclusion of the trial, so look at yourself
7 as insurance policies that we can get this case
8 absolutely finished in the event that something

9 happens that makes one of the 12 jurors unable
10 to serve, but we want all of you, all of you to
11 pay 100 percent attention and feel a part of the
12 group, so that's the answer to that question.

13 Tomorrow morning that bench may not be
14 there. We're going to try to rearrange that a
15 bit. You like that. I know these folks share
16 your feeling. These chairs are no picnic either
17 over here, but we're going to try to get things
18 arranged so that we get you more comfortable and
19 get a few more pillows down here. If you want
20 to bring a pillow from home or some support,
21 feel free to do that.

22 Those of you who have cell phones, in
23 some courtrooms and some jury rooms there are
24 signs that say you can't use them. This is a
25 long trial. I know you are going to need to

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1 access the outside world on the breaks.

2 You may use your cell phones, but be sure
3 to have them turned off when you come into
4 court. And when you use them, use them in a way
5 where you are not affecting everyone else's
6 privacy to do that. Find a place to use them
7 where you can use them reasonably.

8 I thank you for your attention, you're
9 free to go tonight. Watch your step coming out
10 of the box. Remember not to discuss the case,
11 and we'll see tomorrow at 9:30. Travel safely
12 and stay dry. Good evening.

13 (Whereupon, the following
14 proceedings were held in
15 open court, out of the
16 presence of the jury:)

17 THE COURT: A couple of reminders to
18 plaintiff's counsel, I know it will be
19 difficult, but when you refer to the decedent it
20 must be by first and last name. I know that it
21 has probably gotten comfortable, but it simply
22 has to be that counsel refer to him by first and
23 last name, or as Mr. Williams.

24 Of course, Mrs. Williams may refer to her
25 husband in any way she chooses, in any way that

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1 is comfortable, but the lawyers need to keep the
2 Court's rule observed.

3 And Mrs. Williams, and for the members of
4 your family, if at any point during the trial
5 things become difficult for you, you just feel
6 free to do whatever works for you. If you need
7 to leave, that's absolutely okay. If you need a
8 break, you let us know. We want to be sure that
9 we can get the trial concluded and if you feel
10 you need time to compose yourself or something
11 is really disturbing you, just let your lawyers
12 know and we'll take a break and see if we can
13 accommodate that.

14 MRS. WILLIAMS: Thank you.

15 THE COURT: Anything for the record from
16 the plaintiffs?

17 MR. GAYLORD: No, Your Honor.

18 THE COURT: Defense?

19 For you, 8:45. I want to take up first

20 with the defendant's motion regarding
21 Dr. Benowitz's testimony.
22 We're off the record.
23 (Court adjourned, 2-24-99,
24 Afternoon Session, at 5:00 p.m.)
25

1 REPORTER'S CERTIFICATE
2

3 I, Katie Bradford, Official Reporter of
4 the Circuit Court of the State of Oregon, Fourth
5 Judicial District, certify that I reported in
6 stenotype the oral proceedings had upon the
7 hearing of the above-entitled cause before the
8 HONORABLE ANNA J. BROWN, Circuit Judge, on
9 February 24, 1999;

10 That I have subsequently caused my
11 stenotype notes, so taken, to be reduced to
12 computer-aided transcription under my direction;
13 and that the foregoing transcript, Pages 1
14 through 77, both inclusive, constitutes a full,
15 true and accurate record of said proceedings, so
16 reported by me in stenotype as aforesaid.

17 Witness my hand and CSR Seal at Portland,
18 Oregon, this 24th day of February, 1999.
19
20
21

Katie Bradford, CSR 90-0148
Official Court Reporter

22 I certify this original/duplicate
23 original is valid only if it bears my red
24 colored CSR Seal. Katie Bradford
25

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